BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING A JUDGE:
HONORABLE CYNTHIA HOLLOWAY
JQC NO. 00-143
_____/

FLORIDA SUPREME COURT
CASE NO. 00-2226

SECOND AMENDED MOTION FOR PROTECTIVE ORDER

COMES NOW the undersigned witness in this cause, MARK JOHNSON, who is not an attorney and is acting pro se, and hereby files the above-styled matter pursuant to Rule 1.280(c), Florida Rules of Civil Procedure, and as grounds therefore, states as follows:

1. This is an action to quash in its entirety the Subpoena Duces Tecum For Deposition directed by Judge Holloway's attorneys to John V. Wylie, M.D., on August 30, 2001.

2. Counsel to the Judge previously sought to subpoena Dr. Wylie's records without deposition, but the undersigned objected via his Motion for Protective Order, dated August 12, 2001. Counsel then set Dr. Wylie's deposition for September 19, 2001, and commanded him to produce every "piece of paper" in his possession regarding the undersigned. (A copy of the uncertified Subpoena Duces Tecum For Deposition is attached as Exhibit "A".)

3. This discovery should not be had because the information sought is privileged and irrelevant under applicable Florida law.

4. Privilege: Dr. Wylie is "a person authorized to practice medicine in any state or nation…who is engaged in the diagnosis or treatment of a mental or emotional condition," and thus is a "psychotherapist." The undersigned is "a person who consults, or is interviewed by, a psychotherapist for purposes of diagnosis or treatment of a mental or emotional condition," thus a "patient." Therefore, under Section 90.503 of the Florida Evidence Code, the undersigned has a "psychotherapist-patient privilege" to "refuse to disclose, and to prevent any other

person from disclosing, confidential communications or records made for the purpose of diagnosis or treatment of the patient's mental or emotional condition… This includes any diagnosis made, and advice given, by the psychotherapist… The privilege may be claimed by the patient."

5. It is well settled law in this country that confidential communications between psychotherapists and patients are protected from compelled disclosure. All 50 states, the District of Columbia (where Dr. Wylie is licensed), and Rule 501 of the Federal Rules of Evidence recognize some form of psychotherapist-patient privilege. Most significantly, the Supreme Court of the United States, in its 1996 decision in Jaffe v. Redmond (116 S.Ct. 1923), explicitly upheld this privilege and rejected the argument that a party's evidentiary needs might outweigh a patient's privacy rights. As Justice Stevens wrote for the 7-2 majority:

> "…Like the spousal and attorney-client privileges, the psychotherapist-patient privilege is 'rooted in the imperative need for confidence and trust'… Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment… The psychotherapist-patient privilege serves the public interest… We hold that confidential communications between a licensed psychotherapist and patients in the course of diagnosis or treatment are protected from compelled disclosure [and] we reject the balancing component implemented by [the lower] court and a small number of states. Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege."

6. When the undersigned was deposed in this matter on May 10, 2001, he repeatedly declined to provide details regarding his privileged communications with Dr. Wylie. Instead, he described only the "nature" of their communications, as required by Rule 1.280(b)(5), Fla.R.Civ.P., by explaining that he and his then-wife

began seeing Dr. Wylie in the early 1990s in Washington, D.C., to discuss "marriage counseling, life issues." The undersigned told the Judge's attorneys that Dr. Wylie's notes reflect highly personal conversations that have absolutely "no relevance in this case." In fact, all of the information sought from Dr. Wylie predates this JQC proceeding and virtually all of it predates the 1997-2001 Adair v. Johnson custody litigation referenced in the Amended Notice of Formal Charges. (So that there is no confusion, the undersigned's former wife is not the "close friend" of Judge Holloway's who was the other party in the Hillsborough County custody case; a copy of the relevant pages of the May 10, 2001 deposition transcript for all citations made herein is attached as Exhibit "B".)

7. When counsel to the Judge persisted, the undersigned said: "I am not going to answer any questions in regard to my marital counseling ten years ago before I ever heard of Cindy Holloway… Since 1994, I have probably seen him four times… I have not told him about Holloway. I haven't seen the guy in two years."

8. The Judge's counsel pressed on, asking about Dr. Wylie's "working diagnosis," to which the deponent replied, "I am not going to talk to you about his diagnosis. It is all in Dr. Carra's report. I am not going to talk to you about it."

9. Sylvia F. Carra, Ph.D., was the Court-appointed expert in the custody case. In July 2000, she submitted a lengthy report on the results of her psychological evaluation of the parties, copies of which the Judge's attorneys have had for months. When the undersigned said "it is all in Dr. Carra's report," he was referring to the complete diagnosis of his psyche contained therein.

10. It should be noted here that the undersigned did not waive his psychotherapist-patient privilege during the custody case. Dr. Wylie never testified, and his records were never subpoenaed or admitted into evidence. The undersigned did answer Dr. Carra's questions about his prior counseling and did arrange for Dr. Wylie to communicate briefly with Dr. Carra. But, this was pursuant

to a specific Order of Court, dated January 26, 1998, which required him to "cooperate fully" with the Court-appointed psychological evaluator, including answering all of her questions and facilitating any requested collateral interviews. When Dr. Carra asked to speak to Dr. Wylie about a particular (unfounded) allegation, the undersigned complied as ordered, but this hardly constituted "voluntary" disclosure, much less waiver of the privilege in this separate and distinct proceeding. (A copy of the January 26, 1998 Order is attached as Exhibit "C"; see paragraph 7.)

11. In addition to having a privilege under Florida Statutes Section 90.503, the undersigned enjoys the same expectation of doctor-patient confidentiality under the "Code of Medical Ethics" that Judge Holloway and her attorneys enjoy when seeing a physician. Dr. Wylie is indeed required by his canon of ethics to "safeguard patient confidences and privacy." And let's not forget: "That whatsoever you shall see or hear of the lives of men or women which is not fitting to be spoken, you will keep inviolably secret." Do Judge Holloway's attorneys oppose the Hippocratic Oath? How long would it take <u>them</u> to invoke the privilege under Section 90.503 if the JQC tried to subpoena Judge Holloway's psychotherapy records?

12. <u>Relevance</u>: Privilege or no privilege, the proposed discovery should be quashed because neither Dr. Wylie's testimony nor his old notes would tend to prove or disprove any material facts in this case, nor lead to the discovery of admissible evidence.

13. How is it reasonable to believe that Dr. Wylie's testimony or records could shed light, directly or indirectly, on <u>Judge Holloway's conduct</u>? He has never counseled her. He did not witness any of the incidents giving way to the charges. He has not seen the undersigned at any point since these incidents took place. He has not been contacted or briefed by the JQC. How could this doctor possibly have

relevant knowledge or information? How could he know, for example, whether Judge Holloway tried to influence a police detective on February 24, 2000; or whether she initiated an ex parte conversation with Judge Ralph Stoddard on March 3, 2000; or whether she insulted Judge Stoddard's integrity or demanded that he make a series of specific rulings in favor of her friend, including that he deny the undersigned's then-pending motion to relocate his daughter's primary residence to Washington, D.C.? How could Dr. Wylie's records tend to prove or disprove the veracity of Judge Holloway's sworn statements in a deposition on July 19, 2000? Dr. Wylie did not attend the deposition or help the undersigned formulate his questions. Even if he did, the transcript speaks for itself.

14. Counsel rationalizes the pursuit of this discovery as follows: "I hope you understand why I want to ask you what you told this doctor about your custody case" (May 10, 2001 deposition transcript, page 153, line 6). But how could any of that be relevant? Is this JQC proceeding on appeal from the Hillsborough County family court? No, the issues in this case are ethical issues, not custody issues, and nothing the undersigned may have told his former counselor years ago can help ascertain the truth regarding Judge Holloway's actions in February, March, and July of 2000.

15. Finally, as noted above, Judge Holloway's attorneys already have a copy of Dr. Carra's extensive psychological evaluation of the undersigned. They already know that one of Florida's most highly respected mental health experts – who did not represent him but rather the Court and the child – has tested him thoroughly and recently and given him a clean bill of health. The Judge's attorneys also know that this neutral expert testified in support of the undersigned at the custody trial in January 2001 and that the Court ultimately resolved the case in a manner favorable to him and his daughter based in part, by statute, on evidence of his sound mental health. In other words, Judge Holloway's attorneys don't even

need Dr. Wylie's testimony or notes if they are truly interested in learning about the undersigned's fitness or about facts in the custody litigation. They already have this information, irrelevant as it is to the charges against Judge Holloway. In sum, while the undersigned can appreciate that Judge Holloway's attorneys have a job to do, he respectfully submits their proposed deposition of Dr. Wylie is intended not to unearth material information but rather to obfuscate – and to create an added annoyance, embarrassment, oppression, and undue burden for an opposing witness, not to mention an unfair expense, as the undersigned would have to pay Dr. Wylie's legal fees.

WHEREFORE, due to the privileged and/or irrelevant nature of the proposed discovery, the undersigned witness respectfully requests that a Protective Order be entered by this Honorable Court to prohibit Judge Holloway's attorneys from compelling production of Dr. Wylie's records or from deposing him on September 19, 2001, or at any other time.

Respectfully submitted,

_____
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COUNTY OF HILLSBOROUGH
STATE OF FLORIDA

The foregoing instrument was affirmed before me this ___ day of September, 2001, by MARK JOHNSON, who ___ is personally known to me or who ___ produced _____ as identification.

SEAL:

_____
NOTARY PUBLIC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of this pleading has been furnished via regular U.S. Mail to the Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 S. Duval Street, Tallahassee, Florida 32399-1927, with true and correct copies furnished via regular U.S. Mail to the persons listed below, on this ___ day of September, 2001.

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